ANALYSIS OF THE FINAL COMMISSION REPORT BY CHIEF JUDGE PROCTER HUG, JR.

The Commission on Structural Alternatives for the Federal Courts of Appeals submitted its Final Report on December 18, 1998. I have had an opportunity to carefully analyze the report and to discuss it with judges and lawyers. I thought it would be helpful to give my evaluation of the Final Report, as I did with the Draft Report.

SUMMARY

The basic question resolved by the Commission is whether the Ninth Circuit should be split. The strong recommendation of the Commission is that it should not be split. It stated:

> Maintaining the court of appeals for the Ninth Circuit as currently aligned respects the character of the West as a distinct region. Having a single court interpret and apply federal law in the western United States, particularly the federal commercial and maritime laws that govern relations with the other nations on the Pacific Rim, is a strength of the circuit that should be maintained.

The Commission recommended a structural change in the Court of Appeals. It proposed that the Ninth Circuit Court of Appeals be divided into three semi-autonomous adjudicative divisions, with the State of California being split into two separate divisions. Panel decisions decided in one division would not be binding precedent in either of the other divisions and each division would have an independent en banc procedure that would have no precedential effect in the other two divisions.

The question then becomes whether the structural changes, as proposed by the Commission, better serve the prime objective of having consistent law throughout the Ninth Circuit.

When a whole new concept of the operation of the Court of Appeals is proposed, the burden should be upon those proposing the change to show that a particular proposal will operate more efficiently, effectively, and better advance the cause of justice than the time-tested procedures that have been in operation for many years.

The Commission stated that it had reviewed all of the available objective data routinely used in court administration to measure performance and efficiency of the federal courts of appeals but could not say that the statistical data tipped decisively in one direction or the other. It noted that while there are differences among the Courts of Appeals, it is impossible to attribute them to any single factor such as size.

In considering the subjective data, the Commission noted that the district judges of the Ninth Circuit do not find the law insufficiently clear to give them guidance in their decisions any more often than their counterparts in other circuits, but they more frequently report inconsistencies between published and unpublished opinions. The Commission then noted that the lawyers of the Ninth Circuit found "*somewhat"* more difficulty in discerning circuit law and predicting outcomes of appeals than lawyers elsewhere, but they did report more often a large or grave problem in doing so.

However, the Commission then stated "[b]ut when all is said and done, neither we nor, we believe, anyone else, can reduce consistency and predictability to statistical analysis. These concepts are too subtle, the decline in quality too incremental, and the effects of size too difficult, to allow evaluation in a freeze-framed moment."

The Commission acknowledges that the conclusion of a need for a major structural change in the Ninth Circuit Court of Appeals is not based upon any objective findings. The

subjective findings are based upon rather minor differences expressed by the Ninth Circuit judges and lawyers, and the belief of the Commission that a smaller decisional unit just works best. There were many responses to the Commission's Draft Report in opposition to the divisional structure. Some of these were by:

The United States Department of Justice
Senator Dianne Feinstein
Governor Pete Wilson
The Ninth Circuit Court of Appeals
The Ninth Circuit Judicial Council
The Association of District Judges of the Ninth Circuit
The Federal Bar Association
The Sierra Club Legal Defense Fund
The Los Angeles County Bar Association
The Chief Judges of the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and DC Circuits
The New York City Bar Association
The Federal Bar Council's Committee on the Second Circuit Courts
The Chicago Council of Lawyers

Under the present structure of the Court of Appeals, we have a viable mechanism that maintains the consistency of law throughout the entire circuit. Panel decisions of all of the judges are binding throughout the entire circuit. The limited en banc procedure provides a mechanism whereby all judges participate in the en banc process by the "stop clock" procedure, requests for en banc, memos circulated to the entire court arguing for and against en banc review, and by a vote of all of the active judges on whether to take a case en banc.

When a case is taken en banc, the en banc court reviews the full case for purposes of clarifying the circuit law, resolving conflicts, or considering questions of exceptional

importance to establish the law of the circuit. There is no additional level of appeal, as there would be with the divisional approach, and there is no litigation upon whether an opinion reflects a direct conflict between divisions or merely distinguishes cases involved, as there would be with the divisional approach.

Our circuit court has the advantage of the diversity and background, experience and geographical identity of a large number of judges that provide important insights into the applications and development of the federal law throughout the nine western United States and Island Territories. It is especially important to note that the judges of the nine other circuit courts of appeals who responded to the Commission's draft opposed the divisional approach. The stated advantages asserted for the divisional approach are heavily outweighed by the disadvantages.

The disadvantages may be summarized as follows:

1. There is no participation of all judges circuit-wide in resolving the circuit law as at present. The only participation is within the division.

2. Resident judges within a division that are assigned to another division would not participate in panels within the resident division for a three-year period and would, for that period, have no say in the en banc consideration of panel decisions within the division of their residence.

3. The proposed Circuit Division court would be an additional level of appeal before finality.

4. The resolution of conflicts by the Circuit Division court would be by 13 judges, not representative of the full court or proportionately representative of the divisions. The Circuit Division would create a category of what, in effect, would be

Super Court Judges, for three-year terms with greater power in determining the law of the circuit.

5. There would be no participation of judges throughout the circuit in the decisions of the Circuit Division, as to whether it should take a case or not take a case or let a panel decision stand.

6. There are statutory problems lurking in the new procedure, two of which I identify but others in an untested procedure could well surface in the future.

7. The practical operation of the divisional approach becomes administratively complex in the manner in which the judges are designated to be assigned among divisions, and the manner in which the Circuit Division is to operate.

The Ninth Circuit has always been willing to re-evaluate itself, its performance, and to experiment with innovations that would lead to greater efficiency and effectiveness. The annual evaluation of the Ninth Circuit's long range plan is specifically designed to do so. Concerns that have surfaced in the Final Report of the Commission could be addressed with far less disruption than a whole new divisional structure. A great majority of the judges and lawyers within the Ninth Circuit concluded that it is operating efficiently and effectively as a large court and should continue doing so. The case has not been made nor the burden of proof carried for a drastic change in the structure of the Ninth Circuit Court of Appeals.

DETAILED ANALYSIS OF THE FINAL REPORT

CHANGES FROM THE DRAFT REPORT

The Final Report retains basically the same recommendations as in the Draft Report.

1. Submitting the strong recommendation that the Ninth Circuit should not be split.

2. Proposing legislation that the Ninth Circuit Court of Appeals be divided into adjudicative divisions, whose panel opinions and en banc opinions would not be binding throughout the circuit, with a separate Circuit Division to resolve only conflicts between decisions in the three adjudicative divisions.
3. Proposing legislation that would authorize (though no longer require) other circuits to utilize the adjudicative divisional approach once the number of judges in the Court of Appeals increases beyond 15.

4. Proposing legislation to permit experiments with two-judge panels.

5. Proposing legislation that would permit experimentation with district court appellate panels.

6. Urging Congress to refrain from changing the Bankruptcy Appellate System until the Judicial Conference has had an adequate opportunity to study it and propose any necessary improvements. However, the specific recommended legislation concerning direct appeals with utilization of the Bankruptcy Appellate Panels was eliminated from the appendices.

There are some changes from the Draft Report to the Final Report.

1. The major change is that for <u>circuits other than the Ninth Circuit</u>, the proposed legislation no longer <u>mandates</u> that the Court of Appeals be divided into adjudicative divisions when the complement of judges exceeds 17. Thus for other circuits, the adjudicative divisional approach becomes entirely optional.

2. The composition of the Circuit Division and method of selection is changed from the 7-judge court originally proposed, to a 13-judge court, composed of the chief judge and 12 other judges in active status chosen by lot in equal numbers from each regional division. The 12 judges would serve non-renewable three-year terms.

3. The Final Report provides that each division would also include some judges not residing within the division, assigned

randomly for specified terms of at least three years, instead of one year as provided in the Draft Report.

4. The proposed statutory provision specifying the particular composition of the Judicial Council of the Ninth Circuit was eliminated, leaving that matter up to the discretion of the Ninth Circuit, as it does with the other circuits.

5. The seven-year Sunset Provision was eliminated. Thus, the concept of the divisional approach being an "experiment" with a termination period is no longer the case.

COMMISSION REPORT AS IT PERTAINS TO THE NINTH CIRCUIT

MAJOR CONCLUSION–NO CIRCUIT SPLIT

The major conclusion of the Commission is that the Ninth Circuit should not be split. The Commission made the following statements supporting that conclusion.

> There is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall. Furthermore, splitting the circuit would impose substantial costs of administrative disruption, not to mention the monetary costs of creating a new circuit. Accordingly, we do not recommend to Congress and the President that they consider legislation to split the circuit.
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> . . .
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> There is one principle that we regard as undebatable: It is wrong to realign circuits (or not realign them) and to restructure courts (or leave them alone) because of particular judicial decisions or

> particular judges. This rule must be faithfully honored, for the independence of the judiciary is of constitutional dimension and requires no less.
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> . . .
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> Maintaining the court of appeals for the Ninth Circuit as currently aligned respects the character of the West as a distinct region. Having a single court interpret and apply federal law in the western United States, particularly the federal commercial and maritime laws that govern relations with the other nations on the Pacific Rim, is a strength of the circuit that should be maintained.
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> . . .
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> Any realignment of circuits would deprive the west coast of a mechanism for obtaining a consistent body of federal appellate law, and of the practical advantages of the Ninth Circuit administrative structure.

The conclusion that the Ninth Circuit should not be split corresponds with the overwhelming opinion of the judges and lawyers in the Ninth Circuit, as well as statements of others concerned with this issue who submitted written statements or gave oral testimony before the Commission. Among those opposing the division of the Ninth Circuit were the following:

- 20 out of the 25 persons testifying at the Seattle Hearing of the Commission.
- 37 out of 38 of the persons testifying at the San Francisco Hearing of the Commission.
- The Governors of the States of Washington, Oregon, California, and Nevada.
- The American Bar Association.

- The Federal Bar Association.
- The United States Department of Justice and the U.S. Attorneys within the Ninth Circuit.
- All of the Public Defenders within the Ninth Circuit.
- Respected scholars: Charles Alan Wright, Arthur Hellman, Anthony Amsterdam, Erwin Chemerinsky, Judy Resnik, Jessie Choper, and Margaret Johns.
- The past Director of the Federal Judicial Center, Judge William Schwartzer.
- The chairman of Long-Range Planning for the U.S. Federal Courts, Judge Otto Skopil.
- A great majority of the judges and lawyers in the Ninth Circuit.

ADJUDICATIVE DIVISIONS FOR THE NINTH CIRCUIT COURT OF APPEALS

Having strongly opposed the division of the Ninth Circuit, the Commission proceeds further to recommend a revised method of operation for the Ninth Circuit Court of Appeals through intra-circuit adjudicative divisions. The essential question then becomes whether the suggested revision of the operation of the Court of Appeals accomplishes the acknowledged goal of having a single court interpret and apply the federal law in the nine western United States and the Island Territories in an efficient and effective manner better than its present method of operation.

When a whole new concept of the operation of courts of appeals is proposed, the burden should be upon those proposing the change to show that a particular proposal will operate more efficiently, effectively, and better advance the cause of justice than the time-tested procedures that have been in operation for many years.

The position of the Ninth Circuit expressed to the Commission is that it is working well and that a great majority of the judges and lawyers in the Ninth Circuit are opposed to a split. This was confirmed by the survey of the Commission in which over two-thirds of the judges in the Ninth Circuit expressed that opinion.

The Commission has proposed that the Ninth Circuit Court of Appeals be divided into three semi-autonomous adjudicative divisions, with the State of California being split into two separate divisions. Panel decisions decided in one division would not be binding precedent in either of the other divisions, and each division would have an independent en banc procedure that would have no precedential effect in the other two divisions. The Commission, in its Final Report, stated that this is essential to its conception of the operation of the divisions. Comments recommending changes to this aspect of the proposal were rejected as antithetical to the proposed divisional structure.

FINDINGS SUPPORTING THE DIVISIONAL STRUCTURE

It is important to assess the arguments the Commission believed required a change in the operation of the Ninth Circuit Court of Appeals. The Commission noted that the arguments had both objective and subjective components. With regard to the objective component, the Final Report states:

> We have reviewed all of the available objective data routinely used in court administration to measure the performance and efficiency of the federal appellate courts, but we cannot say that the statistical criteria tip decisively in one direction or the other. While there are differences among the courts of appeals, differences in judicial vacancy rates, caseload mix, and operating procedures make it impossible to attribute them to any single factor such as size.

The Final Report then considered the subjective opinions of the district judges and lawyers in the Ninth Circuit. With regard to the district judges, the Final Report notes that the district judges in the Ninth Circuit do not find the law insufficiently clear to give them guidance in their decisions anymore often than their counterparts in other circuits, but they more frequently report that difficulties stem from inconsistencies between published and unpublished opinions.

With regard to the lawyers in the Ninth Circuit, the Final Report indicates that Ninth Circuit lawyers found somewhat more difficulty discerning circuit law and predicting outcomes of appeals than lawyers elsewhere and more often than others reported a large or grave problem in doing so. However, the Commission stated, "[b]ut when all is said and done, neither we nor, we believe, anyone else, can reduce consistency and predictability to statistical analysis. These concepts are too subtle, the decline in quality too incremental, and the effects of size too difficult to isolate, to allow evaluation in a freeze-framed moment."

The reaction of the lawyers would be a concern that the Ninth Circuit would wish to address to determine the source of any problem or whether there really is a problem and to consider reasonable steps that can be taken to remedy the problem if it is serious.

However, the fact that there is just somewhat more difficulty than in other circuits does not seem to justify a major change in the structure of the Ninth Circuit Court of Appeals.

Thus, it would appear that the conclusion of a need for the major structural change in the Ninth Circuit Court of Appeals is not based upon any objective findings. The subjective findings are based on rather minor differences expressed by the Ninth Circuit judges and lawyers, and the belief of the Commission that a smaller decisional unit just works best.

RESPONSES IN OPPOSITION TO DIVISIONAL STRUCTURE

There were many responses to the Commission in opposition to this divisional structure, both as the idea pertained to the Ninth Circuit and as it pertained to other circuits in the future. Some of these responses were as follows:

- The United States Department of Justice submitted its response, noting that it approached its perspective from that of a litigant that participated in over 40% of the cases heard in the federal courts of appeals. In opposing the recommendation for the creation of intra-circuit divisions, the Justice Department stated, "we agree with the draft report's recommendation that the Ninth Circuit should not be split at this time, and we concur generally in its view that '[t]here is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall.' In our view, the lack of evidence supporting circuit splits also counsels against what we view as the principal recommendation contained in the draft report–the creation of divisions for the Ninth and other large circuits. That proposal would have potentially adverse repercussions for the administration of justice in the Ninth Circuit and ultimately across all federal courts of appeals."

! Senator Dianne Feinstein wrote: "Since your report was released on October 7, I have talked with federal judges, members of the Bar, and legal scholars in California to discuss the recommendations of the Commission. The overriding consensus among judicial and legal leaders is that it would be disastrous if California were split into Northern and Southern Divisions. Concerns expressed to me about the proposal to divide California focus on the following issues:

> The Middle Division (Northern California) and the Southern Division (Southern California) would not be bound precedentially by each other's decisions. Lawyers would engage in "forum shopping" within the same State for favorable rulings. California corporations subject to federal jurisdiction could be subject to varying interpretations of the same federal and state laws. This could compel businesses to build headquarters in other States where there is no conflict within the federal court system. The lack of uniformity and certainty in the law could create chaos in our state. Imagine if two California divisions disagreed on the constitutionality of any state-wide initiative or law. This could do extraordinary damage to Californians' faith in the integrity and fairness of the judicial system. Another layer of judicial review within the Ninth Circuit would have enormous costs and enlarge the federal bureaucracy."

! Governor Pete Wilson, then Governor of the State of California, responded that "the proposal to divide the Ninth Circuit Court of Appeals into three divisions–which would split California–would be counterproductive and not in the best interests of the people of California." He noted that the divisional arrangement proposed by the Commission would not only undermine the objective of having a single court

interpret and apply the law in the western United States but would also raise new problems. He then listed five specific problems.

- The Ninth Circuit Court of Appeals, the Ninth Circuit Judicial Council, and the Association of District Judges of the Ninth Circuit all voiced opposition to the divisional approach.

- The Federal Bar Association pointed out that although there are regional issues "the much larger portion of appellate issues and caseload are not so regionally unique." They expressed concern that the regional advantage might come at too high a price–"lack of inter-division *stare decisis* and of meaningful en banc review."

- The Sierra Club Legal Defense Fund calls the proposed divisional structure "a solution in search of a problem with little evidence to support the need for such changes." They cite the survey in the Commission Report, which showed that over two-thirds of the circuit judges and the district judges do not favor circuit reconfiguration.

- The Los Angeles County Bar Association stated, "As a representative of many private and public consumers of judicial services in the Ninth Circuit, we . . . register our fundamental disagreement with the proposed restructuring of the Ninth Circuit into divisions. We believe this so-called 'divisional arrangement' will present many, if not all, of the difficulties that the Commission acknowledges would accompany a split of the Circuit. Indeed, as we explain below, we see the proposed divisional structure as a *de facto* split of the Circuit that would, in effect, split California. Yet, the notion of splitting California is the very option that the Draft Report calls 'undesirable.' Draft Report at 46. We believe this same concern applies with equal force to the proposed division of any state." They noted new problems that the divisional arrangement would create: inconvenience and cost; inconsistent interpretation of California state law; forum

shopping and delay tactics; and increased confusion for litigants.

- The Chief Judges of the First, Second, Third, Fourth, Seventh, Eighth, and DC Circuits wrote a joint response to the divisional approach, stating that "The whole concept of intra-circuit divisions, replete with its two levels of en banc review, has far more drawbacks than benefits."

- Judge Winter, Chief Judge of the Second Circuit, wrote a separate letter on behalf of his court "to indicate a strong and unanimous opposition to the Commission's recommendation of mandatory divisions in courts of appeals with authorized judgeships over a certain number." He listed several reasons. "First because such divisions have never been tried, we have no experience with them. The present organization of the regional courts of appeals is hardly working so badly that mandatory resort to a very different and untested form of organization is called for." He then stated it would increase forum shopping and require more judges and concluded "Finally, and most importantly, the major premise of the recommendation for mandatory divisions appears to be that appellate courts with 18 judges or more will inevitably lead to an unacceptably incoherent case law. We do not agree with that major premise. Moreover, we believe that the proposal for mandatory divisions will lead either to more incoherence in case law rather than less or to intolerable collateral consequences."

- Judge Politz, the Chief Judge of the Fifth Circuit, wrote saying that the judges on his court are very concerned and voiced considerable reservations about the proposal for mandatory divisions for circuits with 18 or more active judges. Judge Edith Jones of that court expressed her opposition more colorfully, in that she believes this to be "a dagger pointed at the heart of the Fifth Circuit, with our currently authorized 17 judgeships."

- The New York City Bar Association opposes the recommendation that the federal courts of appeals are required to split themselves into divisions. They recognize that such division is "very nearly the functional equivalent of splitting it into separate circuits." They conclude that this should only be done in extreme circumstances.

- The Federal Bar Council's Committee on the Second Circuit Courts opposes divisions and argues that this will cause greater disharmony in circuit law and an additional burden caused by another layer of review.

- The Chicago Council of Lawyers opposes divisional organization of the Court of Appeals. "[T]his is another bad solution to a 'not proven' problem." They state that the basis for the Commission's recommendation is that according to an unpublished survey, lawyers and district court judges in the Ninth Circuit are "somewhat" more likely "to have trouble discerning circuit law, and that the court is too large for 'collegiality' to work effectively." The Council does not concede that either of these are genuine concerns. It does point out, however, that the divisional approach will "if anything increase uncertainty and hinder collegiality."

COMPARISON OF CIRCUIT DIVISIONS AS OPPOSED TO THE CURRENT OPERATION OF THE CIRCUIT COURT

The essential question is whether the proposed divisional approach is so superior to the current method of operation as to justify changing the basic structure of the Ninth Circuit Court of Appeals.

PRESENT OPERATION OF THE COURT

- Panel decisions are binding throughout the circuit and other panels are obligated to follow that precedent unless it is

overruled en banc. The circuit has developed a sophisticated issue coding procedure and all panels are notified when the same issue is before two or more panels. The first panel to have the issue submitted to it has priority to resolve the issue. However, there is frequently contact between panels having the same issue for consideration of another panel's view.

- There is no empirical evidence that the conflict between panels of the Ninth Circuit is any greater than any other circuit.

- A limited en banc process operates effectively and involves the entire court.

  - Any circuit judge, including senior judges, can call for a "stop clock," which is usually done when a judge wants the panel to consider an objection to a part of the decision.

  - Any judge, including senior judges, can call for en banc and write memos supporting the en banc call or comment on the en banc call of other judges. Generally, there are many insightful memos.

  - All active judges vote on whether to take a case en banc. The limited en banc process is representative of the court as a whole because all of the circuit judges can submit memoranda for or against the en banc call, and all active circuit judges vote on whether to take the case en banc. If the case is not taken en banc, this is a decision of the full court that the panel opinion should stand.

  - The limited en banc decisions are fully accepted by the court as being the final decision of the court as a whole. A majority of the active judges can have a limited en banc decision reviewed by the full court. Since 1980, there have been only five such requests, and the majority of the active judges have never voted

to consider a limited en banc decision before a full court en banc. From 1980 to 1997, there have been 173 cases heard by the limited en banc court. 33% of the decisions were unanimous and 75% of the decisions were rendered by a majority vote of 8-to-3 or greater. This is strong indication that a full court en banc would not have reached a different decision.

- In the calendar year 1996, there were 25 calls for en banc that were voted on by the full court and 12 of the cases were taken en banc. In calendar year 1997, there were 39 calls for en banc that were voted on by the full court and 19 of the cases were taken en banc. In calendar year 1998, there were 45 calls for en banc that were voted on by the full court and 16 of the cases were taken en banc. The full-court participation should be judged not only upon those cases that were taken en banc, but by those cases that were called for en banc, upon which the full court voted.

- There could well be changes in the limited en banc process that would further improve its operation, as suggested by the Justice Department and others. But, these are minor adjustments that could be made and still retain the function of resolving circuit-wide precedent both as to conflicts and as to questions of exceptional importance.

DIVISIONAL OPERATION

- Panel decisions in a division would have a binding precedential effect only in that division and no binding precedential effect in either of the other two divisions.

- The Circuit Division only resolves conflicts between panels in different divisions. Unless there is a conflict with a decision from another division, the law of each division is not reviewed within the circuit, which leaves questions of exceptional importance unreviewed in the Ninth Circuit.

- A very significant difference is the lack of participation in the development of circuit-wide law by all judges. A judge in one division cannot call for en banc in another division, but more important, does not participate in the development of circuit law through the stop clock or en banc procedure, or by circulating memos in support of or opposed to en banc consideration.

- The makeup of the Circuit Division is not proportionately representative of the court as a whole. The Circuit Division is composed of the chief judge and 4 judges from each division. The Northern Division has only 22% of the caseload and would be expected to have 22% of the judges, whereas the Southern Division has 47% of the caseload and would be expected to have 47% of the judges, yet the two divisions would be equally represented on the Circuit Division court.

- There is no input from any of the judges in any of the divisions to seek to have a case heard by the Circuit Division. The statute specifies that the application is to be made by a party to the case. Furthermore, the Circuit Division has discretion whether to take a case or not, regardless of what a majority of the judges of the circuit would consider to be a conflict.

- The Circuit Division presents an additional level of appeal for litigants before they achieve finality.

RELATIVE ADVANTAGES OF THE TWO STRUCTURES

THE PRESENT STRUCTURE

- There is a circuit-wide mechanism that maintains the consistency of law throughout the circuit and is not dependent upon there merely being a conflict between divisions of the court.

- There is circuit-wide participation by the judges in the development of the circuit law. The panel decisions of all the judges are binding throughout the entire circuit. All of the judges participate in the en banc process for the entire circuit by the stop clock procedure, requests for en banc, memos circulated to the entire court arguing for and against an en banc review, and by a vote of all of the active judges on whether to take a case en banc.

- When a case is taken en banc, the en banc court reviews the full case for the purposes of clarifying the circuit law, resolving any conflicts, or considering questions of exceptional importance to establish the law of the circuit.

- There is no additional level of appeal as there would be with the divisional approach.

- There is no litigation on whether an opinion reflects a direct conflict between divisions or merely distinguishes the cases involved, as would be the case with the proposed Circuit Division.

- The circuit court has the advantage of diversity in the background, experience, and geographical identity of a large number of judges, which provide important insights into the application and development of federal law throughout the nine western United States and Island Territories.

THE DIVISIONAL STRUCTURE

The asserted advantages for the divisional approach, as detailed in the Final Report, are as follows:

- Smaller decisional units will promote consistency and predictability because the judges in the smaller units will have a better opportunity to monitor the decisions of all the panels within that division.

- The judges within a division would sit together more frequently, contributing to greater collegiality among those judges, and more predictability as to the results of appeals. Judges in a division would become much more of a "known bench," fostering judicial accountability and public confidence.

- Divisional en banc procedure would arguably operate more effectively.

- Each judge would arguably be relieved of having to keep current with the decisional output of the entire Ninth Circuit Court of Appeals. However, when decisions of other divisions are to be "accorded substantial weight," there would still remain some responsibility on the part of the judges to keep current with the decisions of the other divisions.

The question is whether these asserted advantages really exist and, if so, are out-weighed by the disadvantages of the divisional operation.

DISADVANTAGES OF DIVISIONAL OPERATION

- There is no participation of all judges circuit-wide in resolving circuit law, as at present. The only participation is within the division.

- Resident judges within a division that are assigned to another division, as contemplated in the Final Report, would, for that three-year period, have no say in the en banc consideration of panel decisions within the division of their residence. For example, if a circuit judge who resides in Alaska is randomly assigned for three years to the Southern Division, he would have no say in the en banc process of the Northern Division.

- The resolution of conflict by the Circuit Division would be by 13 judges, not representative of the full court or even proportionately representative of the divisions.

- The Circuit Division would create a category of what, in effect, would be Super Circuit Court Judges with three-year terms, to determine conflicts in circuit law without the participation of any other judges in the circuit.

- There would be no participation of judges throughout the circuit in the decisions of the Circuit Division. In fact, the Circuit Division procedure is only initiated by a party, not a judge, and the Circuit Division can, by a vote of those Super Judges, elect not to consider a case.

- There are statutory problems lurking in the new procedure, which we may not realize. I can identify two.

  - There is a problem under the statute for the Circuit Division to resolve conflicts unless there are two contemporaneous conflicting decisions. If a case in the Northern Division conflicts with a case decided in the Middle Division two years prior, the Circuit Division can only affirm, reverse, or modify the Northern Division case. It cannot modify the Middle Division case. The statute does not provide for the Circuit Division decision to become the law of the circuit. It only affects the decision of the Northern Division.

  - The Final Report states that existing circuit law will be in effect until overruled by a division. However, the statute does not say so. If this is not the case, it would create real problems of determining circuit law. Assuming, however, that existing law is intended to remain in effect, as the Final Report states, and the statute is so amended, this still creates a significant problem. If a division overrules an existing precedent,

> this would not be binding circuit-wide unless there is a case in another division that is in conflict and can be modified. The existing precedent would remain in effect in the other divisions.

THE PRACTICALITY OF HOW THE DIVISIONAL STRUCTURE WOULD WORK

The Commission stated:

> By constituting divisions with both resident and nonresident judges, the divisional structure respects and heightens the regional character deemed a desirable feature of the federal intermediate appellate system, without losing the benefits of diversity inherent in a court drawn from a larger area. The divisional structure draws on the circuit's full complement of judges while restoring a sense of connection between the court and the regions within the circuit by assuring that a majority of the judges in each division come from the geographic area each division serves.

The Commission also indicated that the divisions should be composed so as to equalize the per judge caseload, with each division having a maximum of 11 judges and a minimum of 7. As I will demonstrate, an equal division of the caseload will dictate there being 6 judges in the Northern Division, 9 in the Middle Division, and 13 in the Southern Division.

The caseload for the Ninth Circuit Court of Appeals for the fiscal year that ended September 30, 1998, was 9,070. The appeals originating from each of the divisions is as follows:

Northern Division	1,988	22%
Middle Division	2,831	31%
Southern Division	4,251	47%
Total:	9,070	100%

The average caseload for the 28 judges authorized for the Ninth Circuit Court of Appeals would be: 9,070 divided by 28 = 324 appeals per judge. The number of judges to be fairly allocated to each Division would be:

Northern Division	1,988 divided by 324 = 6
Middle Division	2,831 divided by 324 = 9
Southern Division	4,251 divided by 324 = 13
Total:	28[1]

Following the formulation provided by the Commission Report, that the majority of the judges be residents of the division, with other division judges being assigned to that division, the result would be as shown on the following chart:

Division	Present Authorized Judgeships in Division	Judges Allocated by Caseload	Majority of Allocated Judges	To be Assigned from Other Divisions	To be Assigned to Other Divisions
Northern	9	6	4	2	5
Middle	7	9	5	4	2
Southern	12	13	7	6	5

Thus, for example, in the Northern Division, there would be better than a 50% chance that

[1] If the Northern Division were allocated an additional judge to come from either the Middle Division or the Southern Division, it would mean a substantial increase in caseload for the judges of that division. If the additional judge were to come from the Middle Division, the caseload per judge in the Middle Division would be 353 cases per judge or 1,061 per panel, as opposed to 284 cases per judge or 852 per panel in the Northern Division. Since the judges sit in panels of 3, this would mean that a judge in the Northern Division would have 209 fewer cases per year than a judge in the Middle Division. A nearly identical result would be obtained if the additional judge were to be allocated from the Southern Division. Thus, a fair allocation of the caseload would be as shown with the Northern Division having 6 judges.

a resident judge would be assigned to another division for three years. During that time, the assigned judge would take no part in the panel decisions of the division in which the judge resides, and the judge could take no part in the en banc court in the judge's division. Furthermore, the judge is not expected to keep up on the decisions in the judge's resident division. The same is essentially true for the other divisions, with a somewhat lesser chance of being assigned to another division.

The designation of the presiding judge of each division presents an interesting scenario. Under the statute, the age and time limitations are the same for a presiding judge as for a chief judge, then it goes by seniority, provided that only judges resident in and assigned to the division are eligible. The process would operate as follows:

The presiding judge of the Northern Division would be Judge O'Scannlain, unless, of course, he was one of the five judges randomly assigned to another division. In that case, it would fall to the next judge in seniority that was not assigned to another division. If an assigned judge returns, and is senior and otherwise eligible, I presume that the returning judge would replace the presiding judge.

In the Middle Division, Judge Willie Fletcher would be the presiding judge, unless, of course, he is assigned to another division. In that event, one of the new judges, yet to be appointed and confirmed, would take the position. (Judges Browning, Hug, and Brunetti would be ineligible).

In the Southern Division, Judge Schroeder would be the presiding judge, unless, of course, she is assigned to another division, in which case the position would go to the next eligible judge in seniority that was not assigned to another division.

All this is further complicated in the first three years by the fact that the initial terms of assignment out of division are staggered one-year, two-year, and three-year terms.

The composition of the Circuit Division that resolves circuit conflicts also presents some interesting questions. The 13-judge court is composed of the chief judge and 4 active judges chosen by lot from each division. The Northern Division, which has less than 22% of the caseload, with 6 judges allocated, would have representation on the Circuit Division court equal to the Southern Division, with 47% the caseload and 13 judges allocated. The judges drawn from a division need not be residents of the division, but under the statute, can be one of the assigned judges.

The point is that the Circuit Division court is much less representative of the full court then our present limited en banc court. The Circuit Division is skewed by non-proportional divisional representation. Also, with three-year terms it may be many years before a judge would serve on that court. Our present limited en banc court is drawn at random from the full court. If a judge has not been drawn to be on the en banc court for three successive times, he is automatically placed on the en banc court. Thus, a judge is guaranteed to be on the limited en banc court at least every fourth time the court is constituted.

CONCLUSION

The work of the Commission has been valuable in placing in historical prospective the development of the Federal Appellate System, and conducting hearings and surveys, and in obtaining written comments from a wide spectrum of those concerned with the future of

the Federal Appellate System. Many of the recommendations will be valuable in informing future developments.

It is gratifying that the Commission recommended that the Ninth Circuit not be split and recognized the importance of having a single court interpret and apply federal law in the western United States. However, the evidence does not justify the recommended change to a divisional structure of the Ninth Circuit Court of Appeals. The disadvantages of such a structure far outweigh the claimed advantages and do not justify disrupting a court that the great majority of judges and lawyers within the circuit are convinced is operating efficiently and effectively. The Ninth Circuit has always been willing to re-evaluate itself, its performance, and to experiment with innovations that would lead to greater efficiency and effectiveness. The annual evaluation of the Ninth Circuit's long range plan is specifically designed to do so. Concerns that have surfaced in the Final Report of the Commission can be addressed with far less disruption than a whole new divisional structure.